

REMARKS

Claims 1-5, 10-15, 17, 18 and 21 were pending in this Office Action. The present response does not cancel or add any claims. Accordingly, it is claims 1-5, 10-15, 17, 18 and 21 which are presently at issue.

In the Office Action mailed September 14, 2006, claims 1-5, 10-15, 17-18 and 21 were rejected under 35 U.S.C. §103 as being unpatentable in view of U.S. Patent 6,903,136 of Miller.

Applicant thanks the Examiner for the search, the Office Action, and the thorough explanation of the basis of the rejection.

The Miller 6,903,136 Patent is Not Prior Art

The '136 patent of Miller is not statutory prior art with regard to the presently pending application; alternatively, Applicant is prepared to submit an affidavit under 35 U.S.C. §131 swearing behind the Miller reference.

The Miller patent carries a filing date of April 22, 2003, and is based upon a provisional patent application Serial No. 60/374,978 filed April 22, 2002.

The present application was filed on April 12, 2004, and claims priority of provisional patent application Serial No. 60/462,100 filed on April 11, 2003. Since the anniversary date of the April 11, 2003 filing fell on a Sunday, the present application was properly filed on the succeeding Monday, namely April 12, 2004.

The present application can properly claim the April 11, 2003 filing date of its parent, provisional application. The provisional application discloses and supports all of the presently claimed subject matter.

The April 11, 2003 filing date of the parent of the present application precedes the April 22, 2003 filing date of the cited Miller '136 patent. Furthermore, the Miller '136 patent

cannot claim the April 22, 2002 filing date of its parent provisional application with regard to the disclosure of cinnamon-containing compositions cited to by the Examiner in the rejection of the present claims. The present rejection is based upon teaching in the Miller '136 patent regarding compositions which include creatine, cinnamon extracts, and dextrose in a dietary food supplement. In this regard, the Examiner has cited to various passages including column 3, lines 10-11, 25-27; column 6, lines 3-14, 42-50; and claims 6-7, 13-14 and 17-18. The cited-to subject matter is not shown, suggested or otherwise supported in any way in the original Miller provisional patent application. The original provisional application was solely directed to compositions of creatine and 4-hydroxyisoleucine, and there is no teaching whatsoever of including cinnamon or any cinnamon-derived materials in these compositions. The inclusion of cinnamon materials appears only in the actual Miller '136 patent filed April 22, 2003. As such, the Miller '136 patent cannot in any way predate Applicant's provisional filing which filing date is properly accorded to the present application. As such, Miller '136 is not prior art.

Applicant further notes for the record that Miller, one of the inventors listed in the present application, is the same inventor listed on the Miller '136 patent. Since the present patent application was filed within one year of the Miller '136 patent, Applicant is entitled to submit an affidavit under 35 U.S.C. §131 swearing behind the Miller '136 patent. If requested by the Examiner, Applicant will submit such an affidavit relying upon, among other things, the disclosure of Applicant's prior provisional application, on file in the United States Patent and Trademark Office, in support of prior conception and reduction to practice of the subject invention.

For the Examiner's convenience, Applicant has attached hereto copies of the two provisional patent applications Serial Nos. 60/374,978 and 60/462,100 discussed above.

Conclusion

In view of the foregoing, Applicant respectfully submits that the subject matter of the claims presently at issue is patentable, and the application is in condition for allowance. Any questions, comments or suggestions which the Examiner may have should be directed to the undersigned attorney.

Dated:

Respectfully submitted,

By 

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Attachments